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RAKYAT CORPORATION SDN BHD

v.

ABD NAEEIM TARMIJI

B

HIGH COURT MALAYA, ALOR STAR
SOFIAN ABD RAZAK J
[ORIGINATING SUMMONS NO: 24-312-2006]
24 APRIL 2008

C

LAND LAW: *Restraints on dealings - Caveats - Removal of private caveat - Principles for removal - Three stage test in Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Another - Burden on defendant to show sufficient grounds for continuance of caveat - Sale and purchase of property - Failure by purchaser to pay progressive payments of purchase price - Termination of sale and purchase agreement by vendor - Private caveat entered by purchaser - Whether vendor*

D

entitled to remove caveat - Purchaser falling within class of persons entitled to enter caveat - Vendor aggrieved person - Vendor adversely affected by existence of caveat - No enforceable contract in existence - No evidence of caveatable interest - No serious issue to be tried - Caveat removed

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The plaintiff entered into a Sale and Purchase Agreement ('SPA') to sell a house to the defendant for a purchase price of RM80,000. The defendant paid the plaintiff the sum of RM16,000 as part-payment. However, the defendant later failed to make progress payment to the plaintiff and the plaintiff sent to the defendant a notice of claim for

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progress payment. Subsequently the plaintiff had caused to be issued a notice of termination of the SPA. The plaintiff was then informed that the defendant had entered a private caveat on the said property. The plaintiff then applied under s. 327 of the National Land Code ('NLC') to remove the defendant's private caveat. The plaintiff claimed that the defendant had no caveatable interest on the said property. The defendant

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contended that he had withheld the progress payment because the plaintiff had breached cl. 12 of the SPA. According to the defendant, the construction of the said house was not in accordance with the 4th Schedule of the SPA.

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Held (allowing the plaintiff's application with costs):

(1) The caveat entered would be removed, unless the defendant could show that there are sufficient grounds in fact and law for its continuance. The burden on the caveator is the same burden as imposed in an application for the extension of caveat under s. 326

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of the NLC. The approach adopted by the Court of Appeal in

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tieu Chi & Another in determining whether the caveat entered should remain or remove is to scrutinize the reasons at three stages. (para 17, 19 & 22)

(2) The defendant as a purchaser, *prime facie* fell within the definition of a person claming title to the land and at whose instance a private caveat may be entered under s. 323 of the NLC. Therefore the defendant had cleared the first stage. (paras 25 & 26)

(3) The plaintiff as the aggrieved person had applied to remove the caveat. The plaintiff was adversely affected by the existence of the caveat on the land. (paras 26 & 27)

(4) Clause 12 of the SPA did not provide that the defendant was entitled to withhold or refuse making any payment if the construction of the said house had used material and workmanship which did not conform to description. (para 34)

(5) The evidence adduced did not support the claim to a caveatable interest or that there was a serious issue to be tried or any action pending in any court. The caveator must show an enforceable contract to have a caveatable interest. In the instant case, the Defendant as caveator had failed to show an enforceable contract to have a caveatable interest. (paras 38 & 39)

Case(s) referred to:

Eng Mee Yong v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***

Ganding Maju Sdn Bhd v. KS Property Development Sdn Bhd; Affin-ACF Finance Bhd (Intervener) [2008] 7 CLJ 227 HC ***(refd)***

Jasalam (M) Sdn Bhd v. Wong Koon Yee [2000] 2 CLJ 377 CA ***(refd)***

Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150 SC ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1969] 1 LNS 116 FC ***(refd)***

Wong Kuan Tan v. Gambut Development Sdn Bhd [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441 FC ***(refd)***

Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin [1997] 3 CLJ 854 CA ***(refd)***

Legislation referred to:

National Land Code, ss. 323, 326, 327

For the plaintiff - Badrul Kamal Md Salleh; M/s Abdul Halim Said & Co
For the defendant - C Megalai; M/s Meg Nacha Zahir & Co

Reported by Amutha Suppayah

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JUDGMENT

Sofian Abd Razak J:

[1] This is the plaintiff's application (encl. 1) dated 23 February 2006 under s. 327 of the National Land Code (hereinafter called 'the NLC') B to remove the defendant's private caveat (No: Perserahan 2445/2002) restraining the registration of dealings on the register document of title relating to land held under HS(D) 470/1985, Plot 468, Mukim Mergong, Daerah Kota Setar, Kedah Darul Aman (hereinafter referred to as the said land) and also for damages to be assessed for wrongful C entry of caveat.

Factual Matrix Of The Case

[2] On 21 Mac 2000, the plaintiff entered into a sale and purchase agreement to purchase the said land together with the house erected D thereon (hereinafter called the SPA) exhibited as P1. The purchase price for the said land together with the house erected thereon was the sum of RM80,000 subject to the terms and conditions as stipulated therein.

[3] The defendant had paid the plaintiff the sum of RM16,000 as part E payment of the purchase price and this fact is not denied by the plaintiff. The balance purchase price to be paid by the defendant is the sum of RM64,000.

[4] The defendant had obtained end-financing to pay for the balance purchase price from Bank Kerjasama Rakyat Bhd., Mergong, Alor Star F for the sum of RM52,000. A balance of RM12,000 being the difference between the purchase price and the loan amount. The defendant has to pay the said sum of RM12,000 with the plaintiff before the bank could release the loan amount of RM52,000 in accordance with the third schedule of the SPA on instalment payments.

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[5] The defendant as the purchaser had not made progress payment to the plaintiff as the Vendor despite several reminders sent to the defendant, pursuant to cl. 4 of exh. P1. Copies of the reminder requesting for payments are collectively exhibited by the plaintiff and marked as exh. P2. The defendant had also failed to settle the difference H between the purchase price and the loan amount. Notices requesting the defendant to make payment of the differential sum were sent and collectively marked as exh. P3. The defendant despite being notified of the same had failed to make payment. On or about 26 September 2001, the plaintiff had sent to the defendant a notice of claim for progress I payment at 65% completion for the sum of RM52,000 less the amount paid of RM16,000, and the balance payable to the plaintiff for the sum of RM36,000. On 17 October 2001 in accordance to the terms and

conditions of the SPA (exh. P1) the plaintiff had caused to be issued a notice of termination of the sale & purchase agreement (exh. P1) to the defendant and marked as exh. P4.

[6] The defendant by letter dated 2 February 2002 to the plaintiff had stated the desire to continue with the purchase of the said land by agreeing to make payment of the differential sum of RM12,000. The balance of RM52,000 would be settled through loan from a financial institution. The said letter from the defendant is marked as exh. P5. The defendant despite its promise to settle the differential sum of RM12,000 had willfully and/or neglected to make the said payment, resulting in the plaintiff issuing a second notice of termination of the SPA dated 18 March 2002 which is marked as exh. P6.

[7] On 31 March 2002 the plaintiff was informed that the defendant had caused to be entered a private caveat on the said land *vide* Perserahan No: 2002 (hereinafter called 'the said caveat'). Notice of the entry of the private caveat is exhibited as P7. The plaintiff maintain that the defendant has no caveatable interest on the said land.

[8] The defendant's affidavit in reply affirmed on 6 August 2006 stated the following namely:

[9] That to settle the balance purchase price, the defendant had applied for end financing from Bank Kerjasama Malaysia Bhd., Mergong branch (hereinafter called "the bank"). A copy of the letter of approval of loan from the bank is exhibited as AN 3. The defendant averred that the letter of approval of loan did not mean that he could not pay the differential sum. The defendant denied that he had willfully and/or neglected to make the progress payment. He had withheld the progress payment because the plaintiff had breached cl. 12 of the SPA.

[10] The defendant further stated that on or about the month of September 2000, the construction of the said house was not in accordance with the 4th Schedule of the SPA. This was based on the report made by the consultant engineers, Messrs Perunding Jadi. The defendant also alleged that there were differences between the signature of architect Zahimi Zaiton Ibrahim on the certificate of progress payment for 20% and 35%. The defendant admitted receiving the notices dated 17 October 2001 and 18 March 2002 respectively.

[11] The plaintiff had filed an affidavit in reply affirmed on 19 September 2006 to rebut the defendant's affidavit filed on 26 August 2006. The court adjourned the matter for hearing to 6 December 2006.

[12] On 6 December 2006 when the matter came up for hearing the court was informed that the defendant had filed another affidavit in reply affirmed on 4 December 2006 but was not served on the plaintiff. The learned counsel for the plaintiff urged the court not to consider the defendant's affidavit in reply as it was not served on the plaintiff.

[13] The court after hearing submissions by the learned counsels for both the plaintiff and the defendant ruled that the court would not consider the defendant's affidavit in reply affirmed on 4 December 2006 due to late filing and non service on the plaintiff's solicitors.

[14] The court after perusing the written submission filed by the plaintiff and hearing oral submissions by the learned counsels for both parties, adjourned the matter for decision to 26 February 2007.

[15] On 26 February 2007, the court directed learned counsels for both parties to submit on the principles as stated in the case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520 and adjourned the matter for decision to 28 March 2007, whereby the court allowed the plaintiff's application (encl. 1) with costs.

[16] The defendant who was dissatisfied with the said decision has since filed a notice of appeal. Appended herewith are the reasons for the said decision.

The Law On Caveat

[17] The caveat entered would be removed, unless the defendant could show that there are sufficient grounds in fact and law for its continuance. Lord Diplock in *Eng Mee Yong v. Letchumanan* [1979] 1 LNS 18 thus expressed that the onus is upon the caveator in an application for the removal of a caveat.

> This is the nature of the onus that lies upon the caveator in an application by the caveator under s. 327 for removal of a caveat, he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

[18] Azmi LP in *Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1969] 1 LNS 116 explained the burden of the caveator as follows:

> In my view he has not only to state his grounds but to substantiate them before the learned judge. Do not think it is the intention of the law that when a person enters a private caveat against a land he would not be required to prove that he has a good reason in law for doing

that and that it should be on the part of the proprietor to satisfy the court that the caveator has not got good grounds for entering the private caveat.

[19] The burden on the caveator is the same burden as imposed in an application for the extension of caveat under s. 326 of the NLC. (see the case of *Eng Mee Yong v. Letchumanan* [1979] 1 LNS 18.

[20] The principles as stated in the case of *Eng Mee Yong v. Letchumanan* [1979] 1 LNS 18 are followed in many other cases as follows:

(a) *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd* [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150;

(b) *Jasalam (M) Sdn Bhd v. Wong Koon Yee* [2000] 2 CLJ 377,

(c) *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng (supra)*.

[21] In the case of *Jasalam (M) Sdn Bhd (supra)* the brief facts are the appellant was the purchaser for the whole land *vide* sale and purchase agreement dated 5 November 1996. The respondent, who caveated the said land was at all material times the purchaser of a small portion of the same land *vide* sale and purchase agreement dated 22 January 1973 but did not take any action to register its share of the land in the document of title. The respondent only entered a caveat on the said land on 21 January 1997 and thereafter filed an application for specific performance in July 1998. The Court of Appeal set aside the caveat on the grounds *inter alia* that the respondent's claim did not raise any serious issues to be tried.

[22] The approach adopted by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd (supra)* in determining whether the caveat entered should remain or remove is to scrutinize the reasons at three stages namely:

First, the court is to examine the caveat itself, that is, to look into Form 19B and the reasons stated therein for imposing the caveat. If no caveatable interest has been shown, the caveat ought to be removed without the need to consider the remaining two stages. If Form 19B shows a caveatable interest, the court then moves on to the second stage. The second stage is when an aggrieved party applies to remove the caveat. The court then examines the affidavit evidence of the caveator to find out if the evidence supports the caveatable interest claimed in the Form 19B or shows that the claim to a caveatable interest raises a serious issue to be tried. The court is to examine the evidence in detail and closely. If the evidence does not support the claim to a caveatable interest or that there is a serious issue to be tried on this point, the court is to remove the caveat without going to the

A third stage. Once the first two stages are satisfied, then the court must decide as a third stage, where the balance of convenience lies. It must be noted that at the second stage the caveator is not allowed to justify the retention of the caveat on a ground different from that set out in his Form 19B and the court is required to subject the caveator's affidavit evidence in support of the caveatable interest to "meticulous B scrutiny' (see *Goh Paik Swan v. Ng Choo Lum* [1997] 1 CLJ 77; [1996] 3 MLJ 4370. In *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 2 CLJ 545; [1995] 1 MLJ 782, the Court of Appeal held that the caveator must show an enforceable contract to have a caveatable interest.

C In *Wu Shu Chen*, the caveat was removed because the caveator had merely stated in the Form 19B that they had a caveatable interest 'by virtue of certain document' which they did not exhibit. Mokhtar Sidin JCA said at p 503:

> D As can be seen in the said para 2 above, Goh had not disclosed what that so-called 'certain document' was. He chose to hide it from the world at large and it was as good as having nothing at all to show the caveatable interest he or Mingshu Syndicate claimed. He failed to disclose the instrument of trust in his caveat. Any person making a search on his caveat application form would have no notice of what the claim could be.

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[23] In the instant case, the Form 19B (application for entry of a private caveat) was accompanied by the following grounds verified by a statutory declaration of the defendant.

F Surat Akuan

Saya, Abd Naeeim B. Hj. Tarmiji (KP: A0075003, KP Baru 650501-08-5925) beralamat di F34, Depan Sek. Keb Jalan Baru, 34200 Parit Buntar, Perak, dengan sesungguhnya dan sucihati mengaku bahawa:

1. G Saya telah membayar RM16,000 keatas tanah dan rumah H.S.(D) 470/1985, Plot 468, Mukim Mergong. Rujuk kepada perjanjian jual beli yang ditandatangan pada 21 Mac 2000.

Dan bahawasanya saya mengaku akuan ini dengan sesungguhnya dan sucihati bahawa kandungannya adalah benar dan mengikut peruntukkan-peruntukkan Akta Akuan Berkanun 1960.

H

Diperbuat dan diakui dengan)
sesungguhnya dan sebenarnya)
oleh Abd. Naeeim B. Hj Tarmiji) T.t
pada 27hb Mac 2002)
Di Alor Setar, Kedah Darulaman) T.t

I

Nama: Abdul Talib bin Yaacob No: K046
Pesuruhjaya Sumpah Malaysia
No. 13, Tingkat 1, Bangunan PAS Kedah
Jalan Kota, 05050 Alor Star
Kedah Darul Aman

[24] The stated ground for the application for entry of the caveat was that defendant had paid RM16,000 to the plaintiff for the purchase of the said land and house and reference was made to the sale and purchase agreement dated 21 March 2000. An agreement of sale was not disclosed in the Form 19B but it was mentioned in the defendant's affidavit in reply affirmed on 6 August 2006.

Finding Of The Court

[25] The court is of the view that the defendant as a purchaser, *prime facie* fell within the definition of a person claming title to the land and at whose instance a private caveat may be entered under s. 323 of the NLC. On the issue of the classes of persons who may lodge private caveat, I can do no better than to quote in extenso a passage by Hashim Yeop A. Sani (later CJ Malaya) in the case of *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441; as follows:

> Thus it is plain that the appellant claim to have the right to lodge the caveat but based on cl. 4(a) of the deed of assignment. It is also plain that this was a contractual right applicable only when purchase price is not fully paid. But this alone cannot create a caveatable interest in the land. The contractual provision does not create an interest within the meaning of s. 323 of the National Land Code. Interest which are protectable by caveat are only interests recognized by the Code. The contractual provision does not amount to an equitable or other interest sufficient to support a caveat. Section 323(1) of the National Land Code sets out the classes of persons who may lodge private caveat. They are person or body claiming title to any alienated land; or claiming any registrable interest in any alienated land; or claiming any right to such title or interest; and includes person or body claiming to be beneficially entitled under any trust affecting any such land or interest. The words 'any right to such title or interest' may be wide enough to allow rights arising under a contract for registrable dealing to be protected by a caveat but they are not wide enough to cover mere personal rights as distinguished from rights relating to land. See also David Wong, *Land Tenure in the Malay States* at pp. 416-435.

[26] In this regard, the defendant has cleared the first stage and the court now considers the remaining two stages. The second is where the plaintiff as the aggrieved person has applied to remove the caveat. The term 'aggrieved person' under s. 327 NLC is never defined. In the case of *Wu Shu Chen & Anor v. Raja Zainal Abidin bin Raja Hussin* [1997]

3 CLJ 854; p. 868, the court held that the word 'aggrieved' must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved person is never closed.

[27] Upon perusing the documents annexed to encl. 1, I have no doubt that plaintiff is indeed adversely affected by the existence of the caveat on the land.

[28] In this respect, the court has to examine the affidavit evidence of the defendant to find out if the evidence supports the caveatable interest claimed in the Form 19B or whether it shows that the claim to a caveatable interest raises a serious issue to be tried.

[29] The affidavit evidence of the defendant shows that the relationship which governs both the plaintiff and the defendant was the SPA dated 21 March 2000 based on the standard Sale and Purchase Agreement (Land and Building) Housing Developers (Control and Licensing) Regulations 1989 (Regulation 11(1) Schedule G). The said Sale and Purchase Agreement provides for the mode for claiming progress payment, which is found in cl. 4 under Schedule of payments.

> Clause 4(1) provides that the purchase price shall be paid by the purchase to the vendor by instalments and at the time and in the manner as prescribed in the Third Schedule hereto.
>
> Clause 4(2) provides that 'Every notice referred to in the Third Schedule requesting for payment shall be supported by a certificate signed by the Vendor's Architect or Engineer in charge of the housing development and every such certificate so signed shall be proof of the fact that the works therein referred to have been completed.'

[30] Clause 9 further states as follows:

> 9. Default by Purchaser and determination of Agreement.
>
> (1) If the Purchaser:
>
> (a) fails to pay any instalment payable under clause 4(1) in accordance with the Third Schedule hereto or any part thereof and any interest payable under clause 8; or
>
> (b) fails to pay any sum or sums payable under this Agreement within the time stipulated for payment; or
>
> (c) commits any breach of the terms or conditions contained in this Agreement or fails to perform or observe all or any of the Purchaser's covenants herein contained; or

(d) before payment in full of the purchase price of the said Property, commits an act of bankruptcy or enters into any composition or arrangement with his creditors or, being a company, enters into liquidation, whether compulsory or voluntary.

the Vendor may, subject to sub-clause (2) hereof, annul the sale of the said Property and forthwith terminate this Agreement and in such an event:

(i) the Vendor shall be entitled to deal with or otherwise dispose of the said Property in such manner as the Vendor shall see fit as if this Agreement had not been entered into;

(ii) the instalments previously paid by the Purchaser to the Vendors, excluding any interest paid, shall be dealt with and disposed of as follows:

(a) firstly, all interest calculated in accordance with clause 8 hereof owing and unpaid shall be paid to the Vendor;

(b) secondly, a sum equal to ten per centum (10%) of the purchase price thereof shall be forfeited to the Vendor; and

(c) lastly, the residue thereof shall be refunded to the Purchaser.

(iii) neither party hereto shall have any further claim against the other for costs, damages, compensation or otherwise hereunder; and

(iv) each party hereto shall pay its own costs in the matter.

(2) If the Purchaser fails to comply with any of the terms of this Agreement or if any of such unpaid instalments and interest remain unpaid for any period in excess of twenty-eight (28) days after its due date, the Vendor shall give the Purchaser or his solicitors not less than fourteen (14) days notice in writing by A.R. Registered post to treat this Agreement as having been repudiated by the Purchaser and unless in the meanwhile such default and/or breach alleged is rectified or such unpaid instalments and interest are paid, this Agreement shall, at the expiration of the said notice, be deemed to be annulled.

[31] Clause 12

The said Building shall be constructed in a good and workmanlike manner in accordance with the description set out in the Fourth Schedule hereto and in accordance with plans approved by the Appropriate Authority as in the Second Schedule, which description and plans have been accepted and approved by the Purchaser, as the Purchaser hereby acknowledges. No changes thereto or deviations

A therefrom shall be made without the consent in writing of the Purchaser except such as may be required by the Appropriate Authority. The Purchaser shall not be liable for the cost of such changes or deviations and in the even that the changes or deviations involve the substitution or use of cheaper materials or the omission of works originally agreed to be carried out by the Vendor the Purchaser
B shall be entitled to a corresponding reduction in the purchase price herein or to damages in respect thereof.

[32] The court is of the considered opinion that cls. 4(1) and (2) of the SPA stipulate the obligation on the part of the defendant to make
C progress payment upon receipt of the request for payment supported by a certificate signed by the plaintiff's architect or engineer as proof of the fact that the works therein referred to have been completed.

[33] The defendant admitted receiving the said notices but had refused to make payment on the basis that the plaintiff had breached cl. 12 of
D the SPA.

[34] In this regard, the court is of the view that cl. 12 of the SPA does not provide that the defendant is entitled to withhold or refuse making any payment if the construction of the said house had used material and workmanship which does not conform to description. In
E cl. 12 itself there is safeguard to the defendant in that if the house was not constructed according to the plans approved by the Appropriate Authority, any costs for such changes or deviations shall be borne by the plaintiff. In any event this can only come about when the vacant possession had been handed over to the defendant and it is still within
F the 18 months defect liability period as stated in cl. 23 of the SPA.

[35] Based on the above stated facts, the court held that the plaintiff had complied with cl. 4(2) of the third schedule by serving the notice of claim for progress payment supported by a certificate signed by the
G plaintiff's architect as proof that the works therein referred have been completed.

[36] The court also held that the defendant as purchaser had breached cl. 9(1)(a)(b) and (c) of the SPA.

H **[37]** The court opined that once the defendant as purchaser had breached cls. 9(1)(a)(b) and (c) of the SPA, plaintiff as Vendor may subject to sub cl. 2 annul the sale of the said property (land) and forthwith terminate the SPA to which the plaintiff did. Under cl. 9(1)(i) once the SPA had been terminated, the plaintiff as Vendor shall be
I entitled to deal with or otherwise dispose of the said property (land) in such manner as the plaintiff shall see fit as if this SPA had not been entered into.

[38] It is for these reasons that the court is of the view that the evidence adduced does not support the claim to a caveatable interest or that there is a serious issue to be tried or any action pending in any court.

[39] In *Murugappa Chettier Lakshmanan (supra)* the Court of Appeal held that the caveator must show an enforceable contract to have a caveatable interest. In the instant case, the defendant as caveator has failed to show an enforceable contract to have a caveatable interest.

[40] In the case of *Ganding Maju Sdn Bhd v. KS Property Development Sdn Bhd, Affin-ACF Finance Bhd (Intervener)* [2008] 7 CLJ 227, the facts are almost identical to the facts of the instant case. The brief facts is that the plaintiff applied for the removal of a private caveat entered by the defendant on the said land on 24 October 2002 following the termination of the joint venture agreement between the parties on 26 June 2002. The court held *inter alia* that with the termination of the joint venture agreement there was therefore nothing at all on which the defendant could possibly claim to have any interest in the land, let alone caveatable interest. Thus, the defendant's application for the entry of the caveat after the termination of the joint venture agreement was certainly unmeritorious and misconceived.

[41] Applying the above stated principles to the instant case, the court held that the defendant has failed to pass the second stage of the three stages mentioned in *Luggage Distributors (M) Sdn Bhd (supra)*. The court will not proceed to the third stage to consider where the balance convenience lies.

Conclusion

[42] For the reasons aforesaid, I allowed the plaintiff's application encl. 1 with costs.